

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

| | | |
|-------------------------|---|----------|
| JIMMY BARFIELD, |) | |
| |) | |
| Plaintiff, |) | 8:16CV22 |
| |) | |
| v. |) | |
| |) | |
| KERMIT R. ENGH, FASHION |) | ORDER |
| CLEANERS and DOES 1-5, |) | |
| INCLUSIVE, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

This matter is before the Court on the motion of Kermit R. Engh, Fashion Cleaners, and Does 1-5 ("defendants") to dismiss pursuant Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) (Filing No. [21](#)). On November 15, 2016, defendants filed the present motion, accompanying brief, and index in support of the motion containing attached declarations and evidence to support the motion (Filing Nos. 21, 22, and 23). The plaintiff, Jimmy Barfield ("plaintiff" or "Barfield"), failed to file an opposing brief in accordance with NECivR 7.1(b)(1)(B). However, plaintiff attached a "Site Survey & ADA Evaluation" report to the first amended complaint (Filing No. [20-1](#)).

When parties present material outside the pleadings and the Court does not exclude them from consideration, the Court must treat a Rule 12(b)(6) motion as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). In the event the Court

converts a Rule 12(b)(6) motion to one for summary judgment, the parties are entitled a reasonable opportunity to present all the material that is pertinent to the motion. *Id.* Because the parties have presented material outside of the pleadings for the Court's consideration, the Court will treat this motion as one under Rule 56. The parties will have until January 17, 2017, to submit all pertinent material to the Court.

Defendants have also moved for dismissal under Rule 12(b)(1) arguing plaintiff lacks standing and Barfield's claims are moot (Filing No. [22](#) at 1). The Court will reserve ruling on defendants' Rule 12(b)(1) arguments pending all pertinent material being submitted to the Court. Accordingly,

IT IS ORDERED:

1) Defendants' Rule 12(b)(6) motion will be treated as one under Rule 56.

2) The parties have until January 17, 2017, to submit all pertinent material to the Court.

DATED this 3rd day of January, 2017.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court